Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States
October Term, 1994

William A. Calvo, III,
Petitioner
- against -
The Florida Bar
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

APPENDIX VOLUME I

William A. Calvo, III, *Pro Se*
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Dated: May 8, 1994

74 pp

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Denial of Motion for Rehearing By Florida Supreme Court

Supreme Court of Florida, Thursday, February 10, 1994

The Florida Bar v William A. Calvo, III, Case Number 78,395

Respondent's Motion and Memorandum of Law for Rehearing filed in the above cause is hereby denied. BARKETT, C.J., OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

Opinion & Judgment of the Florida Supreme Court

Supreme Court of Florida, Case Number 78,395

The Florida Bar v William A. Calvo, III

[December 16, 1993]

PER CURIAM.

We have for review the complaint of the Florida Bar and the referee's report recommending that William A. Calvo, III, a Florida attorney, be disbarred for alleged ethical violations.[1] We have jurisdiction. Art. V, 15, Fla.

Const.

In 1985, Calvo was working as counsel to persons in involved in sale of federally regulated securities, an area of law in which he possessed special expertise. Under applicable regulations, Calvo and his clients were required to sell a minimum of twelve million share within 150 days of the effective date of the prospectus, with a closing date no later than April 7, 1985. Failure to meet these requirements would mean that all monies paid by purchasers of the securities had to be returned.

It became apparent that the minimum number of shares would not be sold within the deadline. At this juncture, Calvo either became aware that his clients had arranged to obtain very short-term- "flash" loans or he participated in obtaining those loans. The loan proceeds then were used to create the appearance that the minimum number of shares were being sold. Those who loaned the money in turn were paid exorbitant fees, with

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1. We have previously have addressed a more limited question posed by this case. The Florida Bar v. Calvo, 601 Sc. 2d 1194 (Fla. 1992).

one man receiving a profit of $74,350 for the use of a quarter million dollars for a single day. The net result was that the corporation actually was capitalized at less than fifteen percent of the required amount.

In March 1985, prior to the closing date, one of the principals involved in the securities offer was indicated in Maryland for mail fraud. Under applicable regulations, this was information that Calvo and his clients had a duty to disclose to potential investors in the securities. Calvo and his clients failed to fulfill this obligation.

Closing did not actually occur until almost two weeks later than required, on April 22, 1985. The late closing occurred without the proper filing of notice or permission of the governing authorities, which Calvo knew or should have known was required by law.

Initially, we are unpersuaded by Calvo's contention that the referee erred in not permitting G. Richard Chamberlain to both act as Calvo's counsel and as a potential material witness in the proceeding below.[2] The

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2. We recognize, of course, that Chamberlain ultimately was not called as a witness because the strategy of the parties changed as the case progressed. Nevertheless, the fact that he was a potential witness

referee has substantial discretion in refusing to permit a witness to act as counsel, though there may be some circumstances in which the referee could abuse that discretion. We find no abuse of discretion here.

On the substantive issues, the referee's findings are supported by competent substantial evidence and must be accepted as fact by this Court. We reject Calvo's contention that the referee considered improper matters in reaching his conclusions, and especially Calvo's contention that the referee improperly took notice of the SEC and federal cases that arose out of the conduct in questions. See Securities & Exchange Comm'n v. Electronics Warehouse, Inc., 689 F. Supp. 53 (D. Conn. 1988), aff'd sub nom. Securities & exchange Comm'n v. Calvo, 891 F. 2d 457 (2d Cir. 1989), cert. denied, 496 U.S. 942, 110 S Ct. 3228, 110 L. Ed. 2d 674 (1990); William A. Calvo, III, SEC Admin. Proc. No. 3-7038 (1990).

We agree with Calvo that SEC disciplinary proceedings are subjected to a different standard of review than

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constituted sufficient grounds for the referee's ruling in light of the facts of this case.

are Bar discipline proceeding, but we find that this difference goes only to the weight to be accorded the information in a Florida disciplinary proceeding, not to its admissibility. We find no error in the way the referee admitted and considered this information, especially in light of the overwhelming case against Calvo in the SEC proceedings.

On the question of Calvo's alleged misconduct, we note the following findings of the United States District Court of Connecticut:

> Calvo's reckless conduct was a substantial factor in furthering the violations ... Calvo profited in that, by allowing the offering to close, his law firm received a $15,000 fee from the escrow funds which probably would not otherwise have been paid, a probability of which, by reason of the insufficient sale of stock, was all the more likely. The seriousness of the violations is reflected in {the corporation's} now defunct status and the investors' substantial losses, the result of the fraudulent offering.

18. The temporary receiver has recovered a portion

of the funds, but investors apparently will not be fully reimbursed. Electronics Warehouse, 689 F. Supp. at 69 & 69 n. 18 (citations omitted).

We also reject Calvo's contention that, because the misconduct was originated primarily by his clients, he was required to maintain confidentiality. Florida long has held that the rule of attorney-client is confidentiality comes to an end when an attorney knows that a client is engaged in crime or fraud; and as an experienced securities lawyer, Calvo certainly understood or should have understood the nature of his clients' activities here, see, e.g., Fla. Bar Code of Pro. Resp. D.R. 4-101 (D) (1985); R. Regulating Fla. Bar 4-1.6(b), which are detailed in the federal and SEC cases cited above.[3]

It is irrelevant whether or not the client subsequently is charged with a crime. Far too much criminal activity in today's society goes uncharged, and this fact alone does not excuse attorneys from failing to honor their obliga-

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3. We fully agree with the federal district court's assessment that Calvo's case acts or omission at a minimum constituted reckless misconduct.

tions to the public at large. It is especially incumbent upon attorneys to use their legal expertise to discourage rather than further the type of flagrant fraud on the public involved in this case.

We further reject Calvo's contention that he was denied due process rights and that he cannot be disciplined under the rules of ethics in effect in 1985, which have been superseded by the new Rules Regulating The Florida Bar. As with any rules of attorney discipline promulgated by this Court, the supersedure abrogated the former rules of discipline only as to matter arising after the effective date of the new rules; the earlier rules remain fully enforceable as to event before that date. We find no other error.[4]

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4. We reject Calvo's contention that the referee heard improper expert testimony on the duties of an underwriter's counsel; that the referee improperly considered Calvo's prior disciplinary record; that the referee report lacks factual or legal support; that Calvo was prejudiced by the delay between his misconduct and the present disciplinary proceeding,; and that the compliant against Calvo should be dismissed on technical grounds. On this last point, Calvo notes that the chair of the grievance committee neglected to sign the complaint, which the Bar concedes. However, any error was ministerial and harmless in light of the fact that the chair testified below that the chair testified below that the complaint accurately reflected the committee's findings.

Based on the referee's findings, we agree that disbarrment is appropriate here. In so concluding, we note in aggravation that Calvo previously has been privately reprimanded for minor misconduct. However, we are most influenced by the grave potential for harm that Calvo helped create for the investors who purchased securities based on his or his clients' serious misrepresentations or omissions. While the referee noted that these investors appear to have received some restitution,[5] that fact alone does not obviate a disbarrment. Restitution constitutes mitigating evidence, but it must be weighed against the aggravating evidence.

Here, we find the case severely aggravated, foremost by the great potential for harm to the public at large that Calvo helped create through his reckless misconduct or

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5. In this regard, the referee suggested that restitution may have "had something to do" with the escrow holder, Barnett Bank. The United States District Court of Connecticut, which examined Calvo's case, also concluded that only partial restitution had been made at the behest of the defunct corporation's receiver. Securities & Exchange Comm'n v. Electronics Warehouse, Inc., 689 F. Supp. 53 (D. Conn. 1988), aff'd sub nom. Securities & Exchange Comm'n v. Calvo, 891 F. 2d 457 (2nd Cir. 1989), cert. denied, 496 U.S. 942, 110 S. Ct. 3228, 110 L. Ed. 2d 674 (1990).

omissions. We further find this case aggravated by Calvo's substantial experience in the field of securities law, which was his speciality before the SEC discipline imposed upon him; by the vulnerability of the potential victims involved here; by the dishonest and selfish motive; and by the continuing pattern of misconduct exhibited over the course of Calvo's activities in 1985. See Fla. Stds. Imposing Law. Sancs. 9.22. This was not a case of a single ethical lapse, but of an orchestrated and deliberated pattern of serious misconduct by act or omission.[6] The Standards provide in pertinent part:

> Disbarrment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Id. 5.11 (f). The Standards further provide:

> Disbarrment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty

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6. We specifically reject Calvo's contention that his misconduct was a momentary lapse. To the contrary, through act or omission he helped his clients perpetrate a serious fraud on the public over a period of several weeks.

owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

Id. 7.1 "Conduct" for purposes of these rules can include deliberate omissions.[7]

We can conceive of few situations posing more serious harm to a large segment of the public than a fraudulent offering of securities. Such misconduct certainly is comparable to abuse of client trust funds, except that here the number of persons exposed to the risk of harm potentially was in the hundreds or thousands. Securities fraud of the type at issue here risks robbing many everyday citizens of their investments, their retirement savings, and their financial security. Calvo and his colleagues fraudulently sold securities that may have

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7. The standards are relevant here because they constitute a codification of the Bar and this Court's long-standing customary practices in determining the severity of discipline due. The standards are not ethical standards in themselves, but are mere procedural guides for referees, the Bar, and this Court to use. As such, they are relevant, though not necessarily binding, in all disciplinary cases, including those arising under earlier disciplinary codes.

been worthless from the moment they were purchased. This is misconduct of a most serious order.

For the foregoing reasons, we agree with the referee that Calvo violated Disciplinary Rules 1-102(A)(1) and 1-102 (A)(6) of the rules of discipline in effect at the times in question. Judgment for costs in the amount of $7,252.18 is hereby entered against Calvo and in favor of The Florida Bar, for which sum let execution issue. Calvo shall accept no new clients from the date this opinion is issued, and he is disbarred effective thirty days from the filing of this opinion so that Calvo can close out his practice and protect the interests of existing clients. If Calvo notifies this Court in writing that he is no longer practicing law and does not need the thirty days to protect existing clients, the Clerk of the Court is directed to enter an order making the disbarrment effective at that time.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

THE FILING OF A MOTION FOR REHEARING

SHALL NOT ALTER THE EFFECTIVE DATE OF THIS DISBARRMENT.

Original Proceeding - The Florida Bar

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, Florida; and Stephen C. Whalen, Bar Counsel, Fort Lauderdale, Florida, for Complainant

William A. Calvo, III, pro se, of Houston, Calvo, & Houston, Belleview, Florida, for Respondent

Recommendation and Findings of Referee

Supreme Court of Florida, Before Raymond J. Hare, Referee; December 8, 1992; Supreme Court Case No. 78,395; The Florida Bar Case No. 87-21, 392 (17C).

The Florida Bar v William A. Calvo, III, Case Number 78,395

REPORT OF REFEREE

1. SUMMARY OF PROCEEDINGS:

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein, a final

hearing was held on the following dates: September 14, 15, 16, 17 and 18th, 1992, in Fort Lauderdale, Florida.

All of the pleadings, motions, orders, transcripts and exhibits are forwarded with this report and the foregoing constitutes the record of this case.

Stephen C. Whalen, Esq. appeared as counsel for The Florida Bar and Larry D. Houston, Esq. appeared as counsel for the respondent.

After a finding of probable cause at the Grievance Committee level, a complaint was filed in The Supreme Court of Florida on August 9, 1991, alleging:

In Count I, that respondent knew, or was reckless in not knowing, that the offer period for the sale of securities of a corporation known as Electronics Warehouse to the public had expired, and that he allowed and participated in said closing on the sale approximately two weeks after said period had expired.

In Count II, that respondent allowed and participated in a scheme to obtain short term loans from several individuals who had no intent to buy any shares so that it would appear that the necessary funds to complete

the sale of shares had been obtained, and a closing could be held.

In Count III, that respondent and others misrepresented that the money paid in by subscribers of shares was to be refunded if twelve million shares were not sold and fully paid for within 150 days of the effective date of the Prospectus.

In Count IV, that respondent failed to disclose to investors that the principle shareholder, president and director of Electronics Warehouse was under indictment for mail fraud, and

In Count V, the Complaint realleged the allegations in the previous four counts and alleged that by reason of the foregoing that the respondent had committed ethical violations of the old Rules of Discipline, Rule 1-102(A) (1), and 1-102 (A) (6). Count V had originally charged violations of Rule 3-4.3, Rules of Discipline, and Rules 4-4.1 and 4-8.4 Rules of Professional Conduct but the complainant subsequently dismissed those particular allegations.

The Florida Bar presented evidence in support of its

complaint, and the respondent submitted evidence in his defense. Further, both parties presented evidence and argument concerning aggravating and mitigating factors to be considered in deciding what sanctions to impose, if any.

2. FINDINGS OF FACT AS TO EACH ITEM OF CONDUCT OF WHICH THE RESPONDENT IS CHARGED:

After consideration of all the pleadings, exhibits and evidence before me, I find:

As to Count I - Extending the closing date

The respondent was acting at all times material to this allegation as attorney for the underwriter, Gallagher & Company, as well as acting at times as special counsel for Electronics Warehouse in the sale of the company's securities (complainant's exhibit G, letter dated April 22, 1985 from respondent to Barnett Bank of South Florida, N.A.). He knew that the underwriter and the president of the corporation were having a difficult time selling the shares, and that if a minimum of 12,000,000 shares were not sold and paid for within 150 days of the effective date

of the escrow agent, Barnett Bank. The closing date should have been April 7, 1985, but the closing was not held until April 22, 1985, approximately two weeks late. The investors were on notice that their money would be returned if the minimum number of shares were not sold by April, 1985, and it was not returned even though the minimum number of shares had not been sold by then. Respondent is and was at all times material an experienced securities attorney, and was well aware of the importance to investors of this time limit. No one had authority to extend this time except by a registration statement amendment.

Therefore, the respondent acted with reckless disregard for the safety of the investors' money when he authorized and participated in the closing as attorney for the underwriter approximately two weeks after the deadline.

As to Count II - Short term loans

It became apparent that the specified minimum number of shares would not be sold and paid for by the end of the offering period. Respondent knew that short term

loans had been arranged with several individuals who had no intention of purchasing stock. One was with Marvin T. Richmond, a complainant's witness, who lent $250,000 on the date of the closing. On the respondent's written authorization (complainant's exhibit G), the escrow agent was directed to pay Richmond out of the proceeds of the sale the sum of $324,350, giving Richmond a return of $74,350 for the use of his money for less than one day. Two other individual "investors" were likewise rewarded out of the funds paid to the trustee for Electronics Warehouse at the closing. The net result of this was that the company received, from the offering, approximately $130,000 and not the $964,000 specified in the Prospectus (complainant's exhibit L).

These loans did not constitute proceeds of bona fide sales of stock to public investors, but actually constituted a fraud on legitimate investors.

As to Count III - Manipulative or deceptive devices

Respondent, as underwriter's counsel was charged with seeing that the underwriter performed it's duties with due diligence. The underwriter delegates this due

diligence function to it's counsel (testimony of complainant's witness, James Beasley, Sr.). The Prospectus stated that respondent was counsel for the underwriter, and as such any information coming to his attention about the corporation or his connection with it must be passed on to the investors by way of post-effective amendments to the Prospectus. Respondent claims to have been replaced as underwriter's counsel and retained as special counsel for the company. If so, it was his duty to advise the company to file a post-effective amendment stating that he was no longer counsel for the underwriter. If the company did not do so it was then respondent's duty to notify the United States Securities & Exchange Commission. The underwriter, and especially counsel for the underwriter, have by law a great responsibility and potential liability. An attorney who came to believe he was no longer counsel for the underwriter should be quick to get out and relieve himself of that responsibility and potential liability.

Respondent fraudulently, with others, extended the offering period beyond the time specified. He, with

others, obtained short term loans which inflated the number of shares allegedly sold. The loans were then repaid almost instantaneously with huge profits to the lenders. Neither of these events were ever disclosed to the investors.

As to Count IV - Non-disclosure of Indictment

In March, 1985, prior to the closing on April 22, 1985, Edward W. Bremer, President, director and principle stockholder of Electronics Warehouse was indicted in Maryland on seventeen counts of mail fraud. Respondent and the underwriter were advised about it but failed and neglected to supply this information to investors. Respondent made no effort to check with the proper authorities to see whether or not the indictment had been dropped, which he claimed had been represented to him. It was not dropped and Bremer plead guilty to one count of mail fraud and was sentenced. Authorizing and participating in the closing without making this disclosure was reckless and a breach of respondent's duty to investors.

As to Count V - Ethical Violations

All of the facts stated above are applicable to the remaining allegations in Count V, to wit: "the respondent has violated Rule 1-102 (A) (1), 1-102 (A) (6), old Rules of Discipline."

DR 1-102 stated "(A) A lawyer shall not:

(1) Violate a disciplinary rule.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

3. RECOMMENDATION AS TO WHETHER OR NOT THE RESPONDENT SHOULD BE FOUND GUILTY:

As to each count of the Complaint, I recommend that the respondent be found guilty of violating old Disciplinary Rule 1-102 (A) (6).

4. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

I recommend that the respondent be disbarred from the practice of law in Florida.

5. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD:

After finding of guilty and prior to recommending

discipline to be recommended pursuant to Rule 3-7.6 (k) (1) (4), I considered the following personal history and prior disciplinary record of the respondent, as well as certain aggravating and mitigating circumstances, to wit:

A. Respondent was born in Columbia, S.A. on July 22, 1946, and graduated from The Citadel in 1968. He received his law degree from St. Johns University in 1976 and his LLM in 1977. Respondent was admitted to the Bar in New York in 1976 and to the Bar in Florida in 1980. The major part of his practice involved S.E.C. type work, representing underwriters. He was designated by the Florida Bar in corporate and securities law (see respondent's exhibit number 1, biog. summary).

B. Respondent's prior discipline imposed consisted of a private reprimand by The Florida Bar in May 1987 (see complainant's exhibit N), in which the Bar's complaint had charged that respondent made two improper disbursements from an escrow account entrusted to him, and, that his trust records were inadequate.

C. Factors considered to be aggravating:

1. The above set-forth prior discipline.
2. Respondent's dishonest and selfish motive.
3. Refusal to acknowledge wrongful nature of his conduct.
4. The vulnerability of the victims, the public investors.
5. Respondent's substantial experience in the practice of law, and in particular, the securities law.

D. Factors considered to be mitigating:

1. Delay in the disciplinary proceedings. However, respondent has substantially contributed to the delay and has not demonstrated specific prejudice resulting from the delay.
2. Apparently the investors received restitution. It was not fully described how this came about, but I believe the escrow holder, Barnett Bank, had something to do with it. The respondent returned the fee he had received, plus an additionai $10,000.
3. The respondent was suspended from practicing

before the S.E.C. for two years, and at least 85% of his practice had been before the S.E.C. This suspension destroyed his practice and he moved to North Carolina with his wife, after losing his house. He now practices law with Houston, Calvo & Houston, P.A. in Belleview, Florida.

6. STATEMENTS OF COSTS AND RECOMMENDATION AS TO THE MANNER IN WHICH COSTS SHOULD BE TAXED:

I find the following costs were reasonably incurred by The Florida Bar:

Administrative Costs	$ 500.00
Court Reporter:	
Attendance and transcript costs of Grievance Committee hearing	$ 519.75
Hearings before Referee and transcript costs	$ 576.71
9/8/92 hearing before Referee Attendance & transcript	$ 293.00
9/10/92 hearing before Referee Attendance & transcript	$ 148.54

Attendance at final hearing 9/14-18/92		$ 810.00
Costs of transcript		$2,972.75
		$5,320.75
Investigator cost		
(Service of process)		$ 23.25
Witness costs at trial		$ 437.50
Photocopying		$ 970.68
Total		$7,252.18

It is recommended that all costs and expenses be charged to the respondent.

Dated this 8th day of December, 1992, at Fort Lauderdale, Florida.

Reversal of Decision Limiting Issues at Trial

Opinion of the Florida Supreme Court

Supreme Court of Florida, Case Number 78,395

The Florida Bar v William A. Calvo, III

[July 2, 1992]

PER CURIAM.

William A. Calvo, III, seeks review of an order limit-

ing issues in this disciplinary proceeding to the appropriate discipline pursuant to rule 3-4.6 of the Rules Regulating The Florida Bar. We have jurisdiction. Art. V, 15, Fla. Const.

Disciplinary proceedings were instituted against Calvo after the Securities and Exchange Commission (SEC) issued an order and opinion suspending Calvo from appearing or practicing before the SEC for a period of two years. Prior to suspending Calvo, the SEC successfully sought a civil injunction in federal district court enjoining Calvo from violating various anti-fraud provisions of the federal securities laws.

We recently addressed the question of whether an order of suspension issued by the SEC is a final adjudication of discipline by a foreign jurisdiction under rule 3-4.6, holding that it is not. The Fla. Bar v. Tepps, No. 76,468 (Fla. May 28, 1992). Accordingly, we reject the referee's order limiting the issues in this proceeding and remand for a full evidentiary hearing.

It is so ordered.

BARKETT, C.J. and OVERTO, MCDONALD, SHAW,

GRIMES, KOGAN and HARDING, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

Original Proceeding - The Florida Bar

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, Florida; and Stephen C. Whalen, Bar Counsel, Fort Lauderdale, Florida, for Complainant

William A. Calvo, III, in pro se, Belleview, Florida, for Respondent

Constitutional, Statutory & Regulatory Provisions Involved

Constitutional Provisions

United States

Article One, Section Nine [3]: "No Bill of Att[a]
or ex post facto Law shall be passed.

Fifth Amendment to the Constitution: "No
shall be held to answer for a capital, or other

famous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

Eighth Amendment to the Constitution: "Excessive bail shall not be required, nor excessive fines imposed,

nor cruel and unusual punishment inflicted."

Fourteenth Amendment to the Constitution, Section 1: "All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of the law; nor deny to any person within its jurisdiction the equal protection of the law."

Florida

Article One:

Section Two

Basic Rights.

All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposi-

tion and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.

Section Nine

Due process

No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Section Sixteen (a)

Rights of accused ....

(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge

venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties he will be tried. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

Section Seventeen

Excessive punishments

Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

Regulatory Provisions

Securities and Exchange Commission Rules

Rule 436 Consents Required in Special Cases.

(a) If any portion of the report or opinion of an expert or counsel is quoted or summarized as such in the registration statement or in a prospectus, the written consent of the expert or counsel shall be filed as an exhibit to the registration statement and shall ex-

pressly state that the expert or counsel consents to such quotation or summarization.

(b) If it is stated that any information contained in the registration statement has been reviewed or passed upon by any persons and that such information is set forth in the registration statement upon the authority of or in reliance upon such persons as experts, the written consents of such persons shall be filed as exhibits to the registration statement.

(c) Notwithstanding the provisions of paragraph (b) of this section, a report on unaudited interim financial information (as defined in paragraph (d) of this section) by an independent accountant who has conducted a review of such interim financial information shall not be considered a part of a registration statement prepared or certified by an accountant or a report prepared or certified by an accountant within the meaning of sections 7 and 11 of the Act.

(d) The term "report on unaudited interim financial information" shall mean a report which consists of the following:

(1) A statement that the review of interim financial information was made in accordance with established professional standards for such reviews;

(2) An identification of the interim financial information reviewed;

(3) A description of the procedures for a review of interim financial information;

(4) A statement that a review of interim financial information is substantially less in scope than an examination in accordance with generally accepted auditing standards, the objective of which is an expression of opinion regarding the financial statements taken as a whole, and, accordingly, no such opinion is expressed; and

(5) A statement about whether the accountant is aware of any material modifications that should be made to the accompanying financial information so that it conforms with generally accepted accounting principles.

(e) Where a counsel is named as having acted for the underwriters or selling security holders, no consent will be

required by reason of his being named as having acted in such capacity.

(f) Where the opinion of one counsel relies upon the opinion of another counsel, the consent of the counsel whose prepared opinion is relied upon need not be furnished.

(g) (1) Notwithstanding the provisions of paragraphs (a) and (b) of this section, the security rating assigned to a class of debt securities, a class of convertible debt securities, or a class of preferred stock by a nationally recognized statistical rating organization shall not be considered a part of a registration statement prepared or certified by a person within the meaning of sections 7 and 11 of the Act.

(2) For the purpose of paragraph (g)(1) of this section, the term "nationally recognized statistical rating organization" shall have the same meaning as used in Rule 15c3-1 (c)(2)(vi)(F) (17 CFR 240.15c3-1 (c)(2)(vi)(F)).

Rules Regulating Florida Bar

Former Disciplinary Rule 1-102. Misconduct:

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Current Rule 3-7.4

(k) **Preparation, Forwarding, and Review of Grievance Committee Complaints.**

If a grievance committee finds probable cause, the bar counsel assigned to the committee shall promptly prepare a record of its investigation and a formal com-

plaint. The record before the committee shall consist of all reports, correspondence, papers, and/or recordings furnished to or received from the respondent and the transcript of grievance committee meetings or hearings, if the proceedings were attended by a court reporter; provided, however, that the committee may retire into private session to debate the issues involved and to reach a decision as to the action to be taken. The formal complaint shall be signed by the member of the committee who presided in the proceeding. The formal complaint shall be in such form as shall be prescribed by the board. If the presiding member of the grievance committee disagrees with the form of the complaint, the presiding member may direct bar counsel to make changes accordingly. If bar counsel does not agree with the changes, the matter shall be referred to the designated reviewer of the committee for appropriate action. When a formal complaint by a grievance committee is not referred to the designated reviewer, or returned to the grievance committee for further action, the formal complaint shall be promptly forwarded to and reviewed by bar headquarters

staff counsel who shall file the formal complaint, and furnish a copy of the formal complaint to the respondent. A copy of the record shall be made available to the respondent at the respondent's expense.

Current Rule 4-1.2

(c) **Limitation of Objectives of Representation.** A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) **Criminal or Fraudulent Conduct.** A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.[8]

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8. Comment: .... Criminal, fraudulent, and prohibited transaction: A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not assist a client in conduct that the lawyer knows or reasonably should know to be criminal or fraudulent.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by rule 4-1 6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Current Rule 4-3.7 *Lawyer as Witness*

(a) **When Lawyer May Testify.**

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of for-

There is a critical distinction between presenting as analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

mality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case; or

(4) disqualification of the lawyer would work substantial hardship on the client.

Florida Evidence Code

Section 90.203 Compulsory Judicial Notice Upon Request

A court shall take judicial notice of any matter in Section 90.202[9] when a party requests it and:

(1) Gives each adverse party timely written notice of the request, proof of which is filed with the court, to enable the adverse party to prepare to meet the request.

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9. Section 90.202 involves matters which may be judicially noted, *e.g.*, paragraph six thereof states "Records of any court of this state or of any court of record of the United States or any state, territory, and jurisdiction of the United States.

(2) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

Section 90.616 Exclusion of Witnesses

(1) At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses except as provided in subsection (2).

(2) A witness may not be excluded if he is:

(a) A party who is a natural person.

(b) In a civil case, an officer or employee of a party that is not a natural person. The party's attorney shall designate the officer or employee who shall be the party's representative.

(c) A person whose presence is shown by the party's attorney to be essential to the presentation of the party's cause.

(d) In a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful rep-

resentative of such person, unless, upon motion, the court determines such person's presence to be prejudicial.

Opinion in SEC 2(e) Proceeding

Administrative Proceeding File No. 3-7038; United States Securities and Exchange Commission; In the Matter of William A. Calvo, III; Initial Decision

Appearances: Benjamin Greenspoon, Richard M. Humes and John J. Nicholas, for the Commission's Division of Enforcement. G. Richard Chamberlin, for William A. Calvo, III.

Before: Max O. Regensteiner, Administrative Law Judge.

William A. Calvo, III ("Calvo" or "respondent") is an attorney licensed to practice in Florida and New York, who until recently practiced before the Commission. In an action brought by the Commission against him and others in the United States District Court for the District of Connecticut, the Court, in June 1988, granted the

Commission's motion for summary judgment against Calvo. It found that he had violated or aided and abetted violations of the antifraud provisions of Section 17 (a) of the Securities Act of 1933, Section 10 (b) and 15(c) of the Securities and Exchange Act of 1934 and Rules 10b-5, 10b-9 and 15c2-4 under that act in connection with a public offering of the stock of The Electronics Warehouse, Inc., ("Warehouse").[10] Based on these and certain additional findings, the Court permanently enjoined Calvo from violating the above provisions. Pursuant to Rule 2(e) (3) of its Rules of Practice, the Commission thereupon issued an Order temporarily suspending Calvo from appearing or practicing before the Commission. Subsequently, it denied Calvo's petition to lift the suspension and set the matter down for public hearings, to be followed by a determination of what, if any, sanction should be imposed on him.

Hearings were held at which Calvo was represented

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10. S.E.C. v. The Electronics Warehouse, Inc., et. al, 689 F. Supp. 53 Supp. 53 (D. Conn. 1988). Subsequent to the hearings herein, the Court denied a motion for reconsideration. Calvo has filed an Appeal for the Second Circuit, which is pending.

by counsel. The Division of Enforcement introduced the injunction and the Court's findings and certain other evidence; Calvo presented in his defense concerning the circumstances surrounding the Warehouse offering and his conduct in connection with it as character witnesses; and the Division presented further evidence by way of rebuttal.[11] Thereafter the parties filed proposed findings and supporting briefs, followed by reply briefs. To the extend my finding and conclusions reflect evidence presented before me, they are based on the preponderance of the evidence as determined from the record and upon observation of the witnesses.[12]

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11. Subsequent to the close of the hearings, I received in evidence (1) the District Court's Ruling denying Calvo's motion for reconsideration and (2) the parties' briefs to the Second Circuit, together with appendices.

12. Calvo contends that the appropriate standard should be the higher clear and convincing evidence standard, citing S.E.C. v. National Student Marketing Corp.. 457 F. Supp. 682 (D.C. 1978). However, the language in that decision that he relies on lost its vitality when the Supreme Court, in Steadman v. S.E.C, 450 U.S. 91 (1981), held that the appropriate standard of proof in the Commission's administrative proceedings is the preponderance of the evidence standard. In William P. Carter, 47 S.E.C. 471,472 n. 3 (1981),the Commission stated that this was the standard applicable in Rule 2(e) proceedings.

The Respondent

Calvo received a J.D. degree in 1976 and an LLM in International Legal Studies in 1977. Most of his legal career has been spent in the private practice of corporate and Securities law. As noted, he is admitted to practice in Florida and New York.

The Warehouse Offering

Warehouse was founded in 1982 by one Edward Bremer, to engage in mail order marketing of electronic products. Bremer was its principal shareholder as well as president and a director. On November 8, 1984, the Commission declared effective a post effective amendment (Amendment No. 3) to a registration statement for Warehouse.[13] Under its terms, the underwriter, Gallagher & Co., was to use its best efforts to sell a maximum of 15 million at 10 cents a share on a "12 million share or none" basis within 90 days of the prospectus

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13. The registration statement had originally become effective in June 1984. However, the original underwriter was suspended from membership in the National Association of Securities Dealers during the offering period, requiring Warehouse to obtain a new underwriter and to postpone the offering.

date, or within 150 days if extended by agreement between the company and the underwriter. If 12 million shares were not sold and paid for within the offering period, all funds received from subscribers were to be returned to them. In the meantime, such funds were to be held in escrow by a bank. The prospectus stated that Warehouse was "completely dependent" on the personal efforts and abilities of Bremer, its chief executive officer, who would devote his entire time to its activities, and that the loss or unavailability of his services would have a materially adverse effect on Warehouse's business prospects and/or potential earning capacity. Calvo was named as counsel for the underwriter.[14]

The offering period was extended to 150 days, which meant that it expired on April 7, 1985. However, the offering was permitted to continue to April 22, when the closing took place. The proceeds were disbursed pursuant to Calvo's directions, including a $15,000 fee to

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14. The prospectus actually named Calvo and Bofshever. However, according to Calvo, this was not really a partnership, but simply an association.

Calvo and $ 324,350 to one Marvin Richmond. Not long thereafter, Warehouse went into receivership and, according to the Court, investors suffered substantial losses.

The Effect of the Court's Findings

A substantial part of the Division's proposed findings is predicated on the findings of the District Court. With minor exceptions, those proposed findings accurately reflect the Court's findings. Yet Calvo, disregarding their source, attacks many of them as distorted, misleading or unsupported by the record. This record approach reflects his contention that because the Court's decision is presently on appeal, it has no "res judicata, collateral estoppel or issue preclusive effect" in these proceedings and cannot be used to prove facts in dispute. (Reply brief, p. 33)

Rule 2(e) (3) provides that in a hearing such as the one held here, the petitioner (respondent) may not contest any finding made against him in the judicial proceeding on which the 2 (3) proceeding is predicated. This is, of course, consistent with general principles of collateral estoppel.[15] Calvo cites no authority in support of his ar-

gument that the pendency of an appeal compels a different result here. If fact, the law is to the contrary. In the D.C. Circuit's recent Blinder Robinson decision, which Calvo himself cites in support of other propositions, the Court stated that the fact that a judgment is pending on appeal ordinarily does not detract from its finality (and therefore its preclusive effect) for purposes of subsequent litigation.[16]

The Court's Findings

Concluding that there was no genuine issue as to any material fact, the Court granted the Commission's motion for summary judgment against Calvo. The Commissions complaint had alleged that Calvo and other defen-

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15. See,e.g., Blinder Robinson & Co., Inc. v. S.E.C., 837 F.2d 1099, 1109 (D.C. Cir. 1988), cert. denied 109 S. Ct. 177.

16. Id. at 1104, n. 6. See Also Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983) ("Under well-settled federal law, the pendency of an appeal does not diminish the res judicata effect of a judgment rendered by a federal court"); 1B J. Moore, Moore's Federal Practice, 10.416[3] ("The federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel."); C.R. Richmond & Co., 46 S.E.C. 412, 414, n. 11 (1976).

dants, including Bremer, the Gallagher firm and Gary Granai, issuer's counsel, fraudulently extended the offering beyond specified in the prospectus; that they obtained short term loans so as to make it appear that the offering had been completed; that the loans were then repaid from the offering proceeds, a fact not disclosed in or contemplated by the prospectus; and that defendants failed to disclose that on March 8, 1985, Bremer was indicted by a federal grand jury on 17 counts of mail fraud. Calvo did not dispute the existence of the fraudulent schemes alleged, but claimed that there were issues of material fact as to whether he knowingly participated. The Court recognized that to find a violation (or aiding and abetting of a violation) of most of the designated sections required a finding of scienter. It held that reckless conduct satisfied the scienter requirement.

The Court's findings of fact and conclusions were as follows: As the termination date of the offering approached, sales of Warehouse stock were far below the 12 million share minimum. Bremer, Russell Gallagher (Gallagher & Co.'s owner) and Granai devised a scheme

to give the appearance that the minimum had been sold. Short term loans were obtained from three persons including Richmond, and the proceeds were wired into the escrow account on April 22, the day of the closing. The lenders had no intention of buying Warehouse stock. At Granai's instruction, Calvo prepared and delivered to the escrow bank a letter authorizing it to release the escrow funds by paying Richmond $324,350, Calvo $25,000 as his fee,[17] and other funds to Gallagher and to Granai as trustee for Warehouse. Of the latter funds, $480,000 was paid to the lenders other than Richmond. As a result, Warehouse received only about $130,000 from the offering, rather than the $964,000 that the prospectus specified it would receive if the 12 million shares were sold. While denying any knowledge of the loans other than Richmond's, Calvo admitted that he authorized the payment to Richmond and that Richmond indicated to him that he was writing money into the escrow account that was "going in with one hand and out with the other."

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17. Actually the amount to be paid, and in fact paid, to Calvo was $15,000.

Calvo claimed that he authorized the payment to Richmond because Granai told him that Richmond had bought an account receivable from Bremer, representing advertising and promotional expenses advance by Bremer on behalf of Warehouse. However, concluded the Court, Calvo had raised no issue of material fact with respect to his recklessness with respect to the Richmond payment. Calvo conceded that Richmond spoke to him to confirm that $324,350 would be paid to Richmond from the escrow account and that he told Calvo he was writing money into the escrow account. Based only on Granai's oral explanation that the payment was for an account payable, Calvo authorized release of nearly one-third of the offering proceeds to Richmond, an amount $74,350 in excess of Richmond's payment. Calvo made no injury as to why Richmond was wiring money to the escrow account, and not to Bremer from whom he was purportedly buying the account receivable, on the same day he was to receive payment of the account receivable, and he did not ask for documentation of the Bremer-Richmond or Bremer-Warehouse transactions.

Moreover, the Court found, nothing in the three post-effective amendments, which Calvo reviewed and for which he bore at least partial responsibility, or in the prospectus informed investors that Warehouse owned Bremer a large amount, that such an amount would be paid from the proceeds of the closing, or that Bremer's advertising agency had performed services for warehouse. Thus, the prospectus was materially misleading. And, assuming Calvo relied on Granai's explanation, it should have put him on notice that authorizing the payment to Richmond made the prospectus materially misleading and that the payment was part of a fraudulent device to close the offering. Releasing the funds in reliance on the information provided by Warehouse's counsel, without any investigation, constituted recklessness on Calvo's part. Moreover, even if he did not know the dubious, if not wrongful, basis for the transaction, he knew it was not disclosed. That knowledge and his failure to rectify the non-disclosure constituted recklessness as a matter of law.

The Court next turned to the fact that the offering

was permitted to continue beyond the 150-day period specified in the prospectus. It found as follows: Calvo reviewed Amendment No. 3 which stated that the offering period was to be measured form the date of the prospectus. Nina Gordon, an attorney employed by him was notified of the November 8 effective date by the Commission. The prospectus displayed this date on the first page. As underwriter's counsel, Calvo supplied and reviewed the escrow agreement form. Under that agreement, the offering period would be measured from the effective date. As a securities law specialist, Calvo was fully aware of the importance of the offering period limits as protection for investors. In February 1985, Calvo received a letter form the escrow bank setting a closing date of April 22, about two weeks beyond the offering period. He also knew the the funds were being deposited into the escrow account up to the morning of the closing. Despite this knowledge, he authorized the escrow bank to dispute the funds on April 22.

The Court went on as follows: Calvo's contentions that he did not know the effective date of the expiration

date of the offering, and that he relied on the bank's letter or that he had been replaced as the underwriter's counsel and had no reason to determine the proper closing date raised no genuine issue of fact with regard to his scienter in authorizing the extended closing. His actual knowledge of the effective date was irrelevant to whether his conduct was reckless. There was no need to determine whether notice to his associate charged him with constructive knowledge of the effective date. His failure to ascertain the correct effective date and hence the proper closing date was in reckless disregard of the truth or falsity of the prospectus' representation as to the offering period. Calvo's argument erroneously presumed that he had no obligation to assure that the offering adhered to the specified time limitation. He should have know that his April 22 letter would lead to what the most modest inquiry would have shown was an illegal and fraudulent closing.

With respect to nondisclosure of Bremer's indictment for mail fraud in March 1985, the Court's indictment the same month. Calvo considered the indictment a material

fact. He suggested to Granai that Bremer should resign and that a post-effective amendment would be filed. Calvo had a duty to investors to act, by causing sales to be suspended pending disclosure or the offering to be canceled. He did not do so. If fact, as Calvo knew before the closing, Bremer had not resigned and no amendment disclosing the indictment had been filed. Bremer pleaded guilty to one count of mail fraud in July 1985.

Calvo claimed that he was told by Granai that the indictment would be dropped, but he made no effort to verify that this had occurred. On April 22, 1985, the day of the closing, Granai gave Calvo a letter signed by Granai and addressed to Gallagher which stated in part that the registration and prospectus complied with applicable requirements and were accurate in all material respects, "except as may be required, if required at all, (as to which our firm expresses no opinion) by the recent proceeding brought against Mr. Bremer...." (emphasis added) Calvo was thus informed that the indictment had not been dropped. At best, Granai and Bremer expected that it would be dropped upon Bremer's agreement to

cooperate with the government, Calvo did not verify this information with Bremer's defense attorney or the U.S. Attorney. He insisted that Granai strike the underline portion of the letter and add the following: "It is our opinion, based upon our review of the proceeding and evidence to date that there is little likelihood that the government will prevail in this matter." After receiving the amended opinion letter, Calvo authorized the release of the funds.

The Court went on as follows: Calvo's argument that there was an issue of fact concerning the reasonableness of his conduct, in view of his claimed reliance on Granai's assurances that Bremer would resign and that the indictment would be dropped, is meritless. The indictment of Bremer, Warehouse's president and founder, was a material fact. The prospectus stated that Warehouse was completely dependent on Bremer's personal efforts and abilities and that his unavailability would have a materially adverse effect on the company. His indictment and its consequences were likely to make him unavailable. Moreover, it cast a cloud on the bona fides of

Warehouse, which was essentially his alter ego. Disclosure was required under SEC regulations.

Moreover, Granai's representation that the indictment would be dropped was only a prediction, which Calvo made no effort to verify. There is no issue of fact that, at the time the funds were released, Calvo knew of the indictment, that it had not been dismissed, and that it had not been disclosed in the prospectus. His conduct in authorizing the closing, absent such disclosure, was at least reckless.

If Calvo, as claimed, was not obliged to disclose Bremer's indictment to investors, he was obligated to prevent continued dissemination of misinformation. There is no factual support for his assertion that he was no longer underwriter's counsel at the time of the closing. Up to and at the closing he consulted with Granai and Bremer; acting on Gallagher's behalf, wrote the letter regarding release of funds from escrow; and reviewed the Granai opinion letter addressed to Gallagher and obtained changes in it. Even if Calvo's position as underwriter's counsel did not impose on him a duty of

disclosure or to rectify the misrepresentation, such a duty existed by virtue of his substantial participation in the offering. Thus, he prepared post-effective amendment No. 1 and reviewed amendments Nos. 2 and 3, and he authored the letter authorizing the release of funds from escrow. Moreover, he benefited from the closing by receiving his fee. In failing to disclose the indictment and allowing the offering to be closed without disclosure, Calvo violated his duty to investors, and his conduct was reckless as a matter of law.

The Court then proceeded to consider whether there was a reasonable likelihood of future violations, a necessary predicate for issuance of a permanent injunction. In concluding to issue an injunction, the Court made the following findings: Calvo's reckless conduct was a substantial factor in furthering the violations was reflected in Warehouse's defunct status and the investor's substantial losses. Calvo had not recognized the wrongfulness of his conduct, and lost no opportunity to blame others. He persisted in asserting the unfounded claim that he was removed as underwriter's counsel after amendment No.

3 was filed. There was no showing that Calvo had made any effort to help investors recoup their losses, and he only belatedly agreed to make restitution to the receiver. He had manifested no contribution and portrayed a callous indifference. As a securities attorney, Calvo had the opportunity to commit further violations. The sincerity of his assurances against future violations was problematic.

Contentions[18] of Parties and Findings

As noted, Calvo is not free in this forum to relitigate the Court's findings, including its conclusions regarding his violations.[19] Thus, his argument to the effort that while he "bears a portion of the causative responsibility" (Brief, p. 4), he was not culpable, is not entitled to con-

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18. I am appalled at several significant misstatements of the holdings of cases in the Division's brief. Most disturbing is the reliance on Lloyd Feld, 46 S.E.C. 103 (1975) (inappropriately cited in the brief only by administration proceeding file number) for the proposition that the Commission has "routinely permanently barred" attorneys for certain kinds of misconduct (p.17) In fact, Feld was censured. In a footnote on page 13 it is represented that Jo M. Ferguson was barred. In fact he, too, was censured. There simply can be no excuse for these and other misstatements. Moreover, they tend to cast doubt on the reliability of the Division's commissions in their entirety.

19. Of course, should the Court of Appeals overturn the District Court's decision, the predicate for this proceeding would be removed.

sideration. However, on the issue of what if any sanction is required in the public interest by virtue of the injunction and his violations, Calvo was and is free to present evidence and argument hearing on the degree of his culpability and the existence of mitigating factors.[20] Under Rule 2(e)(3), he has the burden of showing why he should not be sanctioned.

In urging that be not be disqualified from practicing before the commission, Calvo stresses that his involvement in the Warehouse offering was more limited that the normal involvement of underwriter's counsel and that he was not compensated in that role, and he asserts that prior to the closing, whatever involvement his firm had was almost entirely that of a young associate, Nina Gordon. He further asserts that he was led to believe that a t about the effective date of the post-effective amendment, another firm had actually replaced him as underwriter's counsel. With respect to the fact the the 150-day offering period was exceeded, Calvo claims that he was simply not

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20. See Blinder, Robinson Co., Inc. v. S.E.C., 837 F.2d at 1109,1110.

aware of this until long after the closing, that he relied on the escrow bank's notification of the offering's terminated of the offering's termination date and that, in view of his limited contact with the offering, he was justified in not making an independent calculation. With respect to the Bremer indictment, Calvo asserts that he was advised by Granai that it has been dropped, made some effort to confirm that information and pending receipt of written confirmation arranged for proceeds that were to go to the Warehouse to go instead into an escrow account (also referred to by Calvo as a trust account) in Granai's name. With respect to the payment of over $324,000 to Richmond at the closing, Calvo asserts that he was informed by Bremer and Granai that because of the delay in closing the offering, Bremer had advanced about $350,000 to Warehouse to be used for advertising and other expenditures of the nature described in the Use of Proceeds section of the prospectus, and that the resulting receivable was sold to Richmond. He further asserts that verification of these expenditures was to be provided in the Warehouse accountant's "cold comfort"

letter to be furnished before funds were released to Warehouse from Granai's escrow account.

Calvo also urges that the Warehouse matter was an unusual situation that will not be repeated; that, if permitted to resume his securities practice, he will revise the nature of that practice to preclude further problems; that he is well qualified to practice securities law and has good character and integrity; that he paid the receiver for Warehouse $25,000 in settlement, $10,00 more than the fee he had received; and that the Warehouse "fiasco" has already had a devastating impact on his life.

The Division, on the other hand, urges that Calvo be permanently barred from practicing before the Commission. It points to the Court's findings of serious securities law violations and contends that the evidence presented by Calvo, rather that mitigative in nature, only reaffim culpability. It asserts that reaffirms his culpability. It asserts that Calvo has failed to accept responsibility or show remorse, by maintaining he did nothing wrong, claiming that he was replaced as counsel for the underwriter and attempting t place the blame on junior as-

sociates. This attitude, it asserts, indicates that he would again commit violations if permitted to resume practice before the Commission.

At the outset, it should be noted that there is substance to Calvo's argument that the Warehouse offering, and his role in it, were somewhat out of the ordinary. When he came into the picture in the fall of 1984, there was already an effective registration statement; counsel for the original underwriter had done the usual due diligence work. Calvo was asked to draft a post-effective amendment involving only the designation of a substitute underwriter and a restructuring of the terms of the offering. This was not a function typically performed by counsel for the underwriter. And the fee which he was to receive was specifically for that assignment only. Admittedly, he also agreed at that time to represent the underwriter, and he was named as underwriter's counsel in the amended registration statement. Thereafter certain tasks normally performed by underwriter's counsel, involving clearance with the National Association of Securities Dealers ("NASD") and the blue sky work, were assigned

to another law firm.[21] Calvo was not paid a fee which he had asked for to serve as underwriter's counsel. I credit his testimony that he had little contact with the offering for of several months after the post-effective amendment became effective and that, in giving some advice to Gallagher, without charge, he considered that he was essentially seeking merely to cultivate a potential client. It is possible that for a time he actually believed, as he testified, that the other firm had replaced him as counsel for the underwriter. However, subsequent events must have brought home to him that the other principal actors still viewed him as having that status. And his own conduct was that of at least de facto underwriter's counsel with respect to matters other that NASD clearance and blue sky work.

Thus, in January 1985, Granai sent to Calvo draft copies of documents, including the "opinion letter" of issuer's counsel and the "old comfort" letter of the ac-

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21. The record shows that the other firm actually did blue sky work for Warehouse already in June 1984, well before Calvo even came into the picture. (See Resp. exhibit 25).

countant that were to be furnished to the underwriter at closing. At that time, according to Granai's covering letter (Resp. exhibit 18), a January 15 closing was contemplated. There is no suggestion anywhere in the record that Calvo returned the enclosures or told Granai that he had contacted the wrong person. In February, the escrow the offering's termination date. (Resp. exhibit 12) In March, as noted, Granai informed Calvo of Bremer's indictment and discussed the possible consequence with him. Calvo, in turn, discussed the matter with Gallagher. Calvo, in turn, discussed the matter with Gallagher. Calvo's name was never deleted from the Warehouse prospectus. In addition, there are the factors which led the Court to reject Calvo's argument that he was no longer underwriter's counsel at the time of the closing. Thus, Calvo met with Bremer, Granai and Gallagher in his office an April 19,1985, in preparation for the closing; was responsible for the change in the language regarding the Bremer indictment in Granai's letter to Gallagher; and signed the letter to the escrow bank that directed the manner in which the funds held in

escrow by the bank were to be disbursed. Moreover, Calvo attended the closing; the other firm which had supposedly replaced him was not represented. Notwithstanding his testimony that he attended the closing only to collect his fee for preparing the post effective amendment, it is clear that in these activities, Calvo was acting as counsel for the underwriter; his participation cannot be otherwise explained. Moreover, his letter to the escrow bank represented that "we represented Gallagher and Company, the underwriter. . ." Calvo attempt to explain away this language as indicating simply that he represented Gallagher, which happened to be the underwriter, and not that the Court's finding, not subject to challenge here, was that Calvo was still underwriter's counsel at the time of the closing.

There may be mitigating circumstances with respect to Calvo's misconduct involving the delayed closing. The Court did find that Calvo knew at the time that the offering continued beyond the 150-days period; it found that he was under a duty to know the correct termination date. Particularly in light of Calvo's somewhat limited

role in the offering, I credit his testimony that he did not know that date and that he relied on the escrow bank's computation.[22] However, neither that factor nor office practice of delegating detail work to junior associates can mitigate his conduct in relation to the payment of a major portion of the funds in the escrow account to Richmond and the nondisclosure of that payment or the Bremer indictment. Calvo himself was fully aware of these matters and was personally responsible for the manner in which they were handled.

With respect to the Bremer indictment, the Court's finding that Calvo made no effort to verify Granai's prediction that the indictment would be dropped is dispositive of that issue. Calvo now claims that on April 19 he asked an associate to make a telephone call to verify that the indictment had been dropped and was informed that it had been.[23] Aside from the fact that the associate flatly

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22. It appears that the escrow bank calculated the termination date from the date of the escrow agreement rather than the effective date of the post effective amendment.

23. In its Ruling on Calvo's motion for reconsideration, the Court noted certain disposition testimony, which was before the Court when it granted summary judgment, and an affidavit filed by Calvo with his

denied being given such an assignment, the claimed reliance on information obtained over the associate who had been hired only a week earlier and was not yet admitted to practice, would in itself have been reckless. Moreover, Granai's opinion letter, in both its original and revised forms, showed that the indictment had not been dropped. Calvo's argument that as a result of his advice the portion of the proceeds to be disbursed to Warehouse went into an escrow account in Granai's name pending receipt of written confirmation that the indictment had been dropped and receipt of certain other documents and information, is of no avail to Calvo. The account was not an escrow account, but simply a bank account in the name of Granai's firm as trustees, and there was no restriction on Granai's ability to disburse the funds.

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motion. In the deposition, he testified that he was told the indictment was going to be dropped. In the affidavit, on the other hand, he claimed that he had advised that the indictment had already been dropped and that an associate had verified this fact. At the hearings in this proceeding, Calvo initially testified that on April 19 Bremer said either that it had been dropped or that it was bending dropped (Tr. 196). A few minutes later he testified that he was told that the indictment "was dropped" (Tr. 202). On cross examination, he testified that his recollection was not clear whether he was told that the indictment was in the process of being dropped or had been dropped. (Tr. 296).

Calvo admittedly had no control over when or how the funds were disbursed. As noted, Granai promptly disbursed most of those funds to the other lenders.

In the Richmond situation, Calvo does not claim that he attempted to verify attempted to verify Bremer's alleged expenditures for projects described in the Use of Proceeds section of the prospectus or the nature of the arrangements between Bremer and Richmond. He again refers to the supposed "second escrow arrangement" (Brief, p. 17) as a vehicle to protect investors, in that no proceeds were to be disbursed to Warehouse until, among other things, the Bremer advances on behalf of the company could be verified.[24] As noted above, this was not really an escrow account. In any event, the payment whose propriety was to be substantiated had already been made at Calvo's direction. As pointed out by the Court in denying reconsideration, about half the proceeds were paid out at the closing (including about

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24. The Court, in denying the motion for reconsideration, noted that Calvo's "second escrow" theory was never alluded to before summary judgment.

one-third to Richmond) pursuant to the terms of Calvo's disbursement letter; under circumstances in which Calvo himself doubted the representations made to him about Richmond and the indictment.

Calvo's Constitutional Claims

Calvo's contends that it is an unconstitutional denial of due process for the injunction action and then to sit as judge and decide how severely he should be sanctioned for the conduct that additional arguments that Rule 2(e) exceeds the Commission's authority and, as applied here through the automatic suspension of Calvo's right to practice before the Commission, violates the 5th Amendment's due process provisions.[25] These or comparable arguments have previously been rejected by the Commission, either in this proceeding when it denied Calvo's motion to dismiss or in prior decisions,[26] and they

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25. Additional arguments that this proceeding also violates the 6th amendment's right to counsel and the 13th amendment's proscription of involuntary warrant further discussion.

26. See William R. Carter, 47 S.E.C. 471, 472 et seq. (1981) (reaffirming the Commission's authority to promulgate Rule 2(e)); Emanuel Fields, 45 S.E.C. 262,265-267 (rejecting contention that "ex parte temporary suspension order" on basis of injunction deprived attorney of due process).

are not open for e-examination by me.

Conclusion

In determining the sanction that is appropriate in the public interested, I have given no weight to the Division's argument that Calvo's continued insistence that he is not culpable signals a likelihood that the same or similar misconduct will recur. As I have repeatedly noted, for the purposes of this proceeding Calvo is bound by the District Court's findings, a fact which he has failed to recognize or acknowledge. However, Calvo is still litigating the injunction proceedings, as he has a perfect right to do, and, as the Court itself pointed out, he cannot be penalized for doing so. (Note 19 of the Court's decision)

The violations found by the Court were of a very serious nature. While Calvo points out that the Court did not find intentional or knowing misconduct on his part, damage to the investing public and the Commission processes can be equally great from reckless conduct. Calvo had a golden opportunity to put a halt to a fraudulent offering. He not only failed to do so, but by his action contributed to the implementation of the

Fraud. Nevertheless, I have determined that Calvo need not be permanently disqualified from practice before the Commission. Among other factors, it appears that he was deceived not only by Bremer, but Granai, a fellow attorney.[27] Despite his continued denial of culpability, I believe, based in part on observation of his demeanor, the testimony of certain of his witnesses, and the great impact on him of the injunction and administrative proceedings, that if permitted to resume practice before the Commission after a substantial period of suspension, he will be vigilant to avoid repetition of the type of misconduct that occurred here or similar misconduct. Everything considered, I conclude that a suspension totaling two years (including the almost 14 months for which he has already been suspend) is appropriate in the public interest.[28]

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27. Granai consented to permanent injunction in the Warehouse proceeding and thereafter, pursuant to an offer of settlement, was permanently disqualified from practice before the Commission. Securities Act Release No. 6762 (March 24, 1988).

28. All proposed finding and conclusions and all contentions have been considered. They are accepted to the extent they are consistent with this decision.

Accordingly, IT IS ORDERED that William A. Calvo, III is hereby disqualified from appearing or practicing before the Commission until July 28, 1990.

This order shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Commission's Rules of Practice. Pursuant to that rule, this initial decision shall become the final decision of the Commission as to each party who has not filed a petition for review pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to party, the initial decision shall not become final with respect to that party.

Respectfully submitted, this 8th day of May, 1994.

\s\William A. Calvo, III\s\

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